

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





*Corrected Copy*

76-1583

To Be Argued By:  
PHILIP B. ABRAMOWITZ

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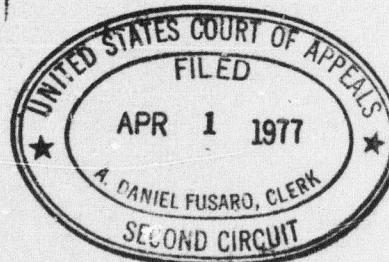
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA, :  
Plaintiff-Appellee, :  
-vs- :  
SALVATORE S. RINIOLO, :  
Defendant-Appellant. :  
-----X

BRIEF FOR DEFENDANT-APPELLANT

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### QUESTIONS PRESENTED

1. Was the evidence adduced at trial sufficient as a matter of law to sustain the conviction?
2. Was the Affidavit in support of the Search Warrant sufficient to establish probable cause to believe that a Federal crime had been committed?
3. Was the sentence excessive?

### PRELIMINARY STATEMENT

This is an Appeal from a judgment of the District Court for the Western District of New York finding defendant guilty after a jury trial of conspiracy to transport women in interstate commerce for the purpose of prostitution. Originally, there were five counts to the indictment. However, before submitting the case to the jury, Judge Brient (sitting by designation) dismissed Count 5 and the jury acquitted the Appellant of the other three substantive counts. On October 28, 1976, the defendant was sentenced to a term of 2-1/2 years.



### FACTS

Having dismissed the 5th count of the Indictment at the end of the Government's case (210), the trial judge later referred to the remaining substantive counts (2 through 4) as follows:

"...I will let them go to the jury,  
but I think they are awfully thin...."  
(309, emphasis supplied)

This comment is most appropriate not only with respect to the substantive counts but with respect to the conspiracy count as well.

Presented below is a chronological treatment, witness by witness, as the jury received it, of the testimony adduced at the trial of Salvatore Riniolo, husband to Marian Riniolo for seventeen years and the father of four children.

Betty Grand who stated that her nickname was "Sammy", was a "madam" who ran a house of prostitution in Pittsburgh, Pennsylvania (55). In mid-December of 1973, she engaged in a series of telephone conversations with a woman named "Ginger" (later identified as Linda Ferguson) in Buffalo, New York (56). Ginger had been referred to Betty Grand by a madam named Lisa from Wilkes-Barre, Pennsylvania (57).

Ginger called because she was short of girls (prostitutes). She asked Betty if she knew anyone who might want to work for her (59). A girl named "Vickie" thereafter went to



Buffalo to work for Ginger (56-61). Betty gave Linda's number to thirty or forty girls (65).

According to Betty, prostitutes commonly refer to their pimps as "my old man" (70). Ginger used that term occasionally, once with reference to someone named "Sal" (70). Betty admitted that when she used the term "my old man", she was referring to her husband who was not a pimp (90). To Ellyn Camiel, another prostitute who later was called by the Government, the phrase "old man" meant boyfriend or husband (138, 139).

In April or May of 1972, Flora Majusick took a bus from Ohio to Buffalo to engage in prostitution (72, 73). She came to work for Linda Ferguson whose name she had received from a friend. When Flora arrived in Buffalo, she took a cab to 829 Elmwood where she met Linda Ferguson (74). She worked for Linda on three separate occasions, the last time being July 24, 1972 (76, 77).

While in Buffalo, she had been introduced to the defendant, Sam Riniolo, and testified that he was present when she and Linda had conversations about "tricks" and what prices to charge (78). When she first met the defendant, Linda introduced him as her "old man" which Flora interpreted to mean her pimp (79). Flora further testified that Sam was a frequent visitor with whom Linda was "madly in love" (98).

When she was ready to return to Ohio, Flora called the bus terminal to find out when the bus left. Sam was present at that time (79). However, Sam never asked her to turn a "trick"



(95). He never called her on the phone to ask her to come to Buffalo. This was always arranged by Linda (96). Furthermore, Flora always gave her business proceeds to Linda (98).

Flora testified that Linda had no nice clothes and that she once loaned some of her clothes to Linda (80). On one occasion, Linda did not have enough money to buy groceries (81). Flora also testified that while Linda did not own a car, Sam drove a Cadillac (81).\*

Rita Burchill (a/k/a Mitzi Hill) resided in Warren, Ohio in 1972 at which time she was sixteen years old (106). In December, 1972, her pimp, Raymond Pandelli, brought her to Buffalo to work for Linda Ferguson, who had made the arrangements with Pandelli (108, 109).

Upon her arrival, she went to 829 Elmwood (lower), the residence of Linda Ferguson (111). There she met "Mamie", a Negro madam, who told her that she was helping Linda (112). Rita later met Linda with whom she discussed the prostitution business and how the proceeds therefrom would be divided (113).

Rita met Salvatore Riniolo and saw him three or four times in the evening during her week stay (113, 114). She was unable to recall if the defendant was ever there when customers called (114, 115).

On one occasion, Linda asked her if Pandelli was a "big time operator" (115, 116). While Linda apparently knew

\*The Government myth--that Linda had no money because Sam received it all--was exposed by the later disclosures of Marian Riniolo, infra, concerning their financial hardship which, in turn, was borne out by the Presentence Report.



that Pandelli used underaged girls, Rita had told her that she was twenty-three (116).

On another occasion, Linda asked Rita if she could turn a few "tricks" "because she wanted some money so she could hold out on Sam, to get a Christmas present (for him), something that he didn't know about" (117). Rita also stated that Linda did not have nice clothes and did not own a car (118).

The night before she left, Linda and Sam were going over the books and Sam told Rita that her earnings were "not bad for a slow week" (117, 118). Mamie accompanied her downtown to pick up her airline ticket (119). Linda was present when Rita called Pandelli about her return (119). She recalled Linda telling her that she (Rita) was crazy to work for a pimp because she could make more money on her own (130).

Ellyn Camiel, in September, 1973, called Linda Ferguson whose number she had received from a Boston madam identified as Carol Williams (133). Linda did not need anyone at the time, but two and a half weeks later, Linda called and asked Ellyn to work for her. Ellyn came to Buffalo by plane from Boston and, upon arriving, took a cab to Linda's Niagara Street apartment (134, 135).

She worked for Linda for a two week period (135). During her stay, she met Sam twice, once at Linda's house (137). It was Linda, however, who answered the phone when clients called (135, 136). Linda also handled all the arrangements for dates (140).



Darlene Bagetta was seventeen years old on January 18, 1974, when she was arrested for prostitution by Buffalo Police at 200 Niagara Street, Apartment 401 (141). She was using the name "Joyce Williams" at the time because she allegedly had been told by Salvatore Riniolo and Harold Nelson (her Albany based pimp) not to use her real name (142).

Darlene called Linda from the police department and Linda told her that she would get Darlene a lawyer (143). The next day, Linda came to get her out of jail (144). They were driven by the defendant to the Elmwood Avenue address (146). Salvatore Riniolo allegedly told her "that they were going for a good six years and that they expected a bust and that everything would be okay" (148). Darlene testified that when Linda came to the jail she told her (Darlene) not to worry because the police were not after her; rather, they were interested in the defendant (149).

Darlene's arrangements to work as a prostitute for Linda Ferguson were set up through her Albany (New York) pimp, Harold Nelson (145). Prior to coming to Buffalo, Nelson had arranged for her to work in Boston (172). However, she was in Albany when the arrangements were made with Linda Ferguson (146) and she came to Buffalo from Albany where she lived (168, 174).

With respect to the business, Darlene testified that Linda would call her at the apartment when a "trick" was coming up. Linda would inform her about what kind of sex the client was seeking and what amount of money he would pay for it (151).



On one occasion, Salvatore picked up an envelope containing money from her (152, 184). On another occasion, he dropped off a key to her (152). Darlene was never threatened by the defendant and she never discussed her age with him (154).

Linda Ferguson became a prostitute at the age of seventeen (212). She first met the defendant when she was working as a waitress (213). She had a relationship with him in her capacity as a prostitute and he became a regular customer (213, 214). Eventually, a romance developed between them (214).

Having undergone a hysterectomy at age twenty-four, Linda called Mamie Harris and requested that she (Mamie) send her a girl (219). Mamie furnished her with the names of other madams through whom she could secure girls (221). Linda was in business from 1972 until 1974 (the time of her arrest) (241). During part of that period, she ran the business with Mamie (242).

When Raymond Pandelli brought Rita Burchill to Buffalo, Mamie was working at Linda's house with her (221). Linda had made the arrangements with Pandelli and the defendant had nothing to do with it (222). Linda expressed total disdain for pimps and testified that she had tried to convince Rita to leave Pandelli (223).

It was Linda who arranged to have "Bunny" (Flora Majusick) come and work for her (229). However, she never borrowed Bunny's clothes, pointing out that Bunny was six feet tall whereas she was only five feet, four inches. In addition, she had two closets filled with beautiful clothes of her own



(230). She also owned a red Cougar (234).

Regarding the business, Linda testified that she received the money from the girls after they turned a "trick" with a client (225). She personally split the money with the girls (226). Linda, pursuing a common practice among madams, always led her girls to believe that she had no money because prostitutes, especially those working for pimps, are not to be trusted (226).

Linda admitted buying gifts for the defendant, adding that she did the same for all good customers (216). She never gave any money to the defendant (219). It was shown that Linda owed a certain finance company over \$1,000.00 and had written a rent check which bounced (248, 249). However, Linda explained that she was the sole support for her young daughter and mother (231) and that she had many bills to pay (232).

She referred to Fred Vickery (a friend), Sam (the defendant), and her step-father as "my old man" (244). When shown a transcript of her telephone conversation with "Sammy", the Pittsburgh madam, where Linda had allegedly stated that "He said not to stay closed", she explained that it was Mamie Harris to whom she referred in that instance and that the "He" should have been "She" (245).

Anthony Bluhm, Linda Ferguson's brother-in-law, said that the Cadillac which the defendant drove from 1972-1974 was a 1969 model which Sam had purchased used (265, 266). The car was in bad shape (265). Linda owned a 1969 Cougar (270).



He further testified that Sam was Linda's boyfriend and that Linda spent a lot of money on her nephews and nieces (267, 270, 271).

Marian Riniolo had been married to the defendant for seventeen years and they had four children (284). She had not been aware of her husband's affair with Linda Ferguson (287).

Mrs. Riniolo testified that they lived together in a rented, \$185-a-month apartment (291). They were unable to pay for their younger children's parochial school tuition because of financial hardship (291). They owned a five year old car upon which a loan was outstanding (292).

Mamie Harris testified that she was in business with Linda and that Linda ran her own business (298, 300). When Linda was in the hospital, Mamie ran the business alone (303). While she knew the defendant, she never had occasion to discuss the business with him (301).



POINT I

THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTION FOR CONSPIRACY TO VIOLATE 18 U.S.C. 2421, 2422, 2423 AND 1952

"In order to constitute a federal offense there must be a showing that the defendant procured or induced the transportation of the female in interstate transportation with the intent of thereby effecting or achieving illicit personal relations or the other purposes prohibited by the statute...'The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities...Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.' Mortensen v. United States, 322 U.S. 369, 373-374, 64 S.Ct. 1037, 1040, 88 L.Ed. 1331 (1944)." United States v. McConney, 329 F.2d 467, 468-9 (2d Cir. 1964)

The holding of this Court above-cited describes the criteria necessary to convict a defendant of a federal substantive offense. No less an intent than that set forth above is required to convict a defendant of conspiracy to commit a substantive offense. See U.S. v. Crimmins, 123 F.2d 272, 273.

Following the jury trial of this indictment, appellant was acquitted of all substantive counts but was found guilty of the conspiracy count. Specifically, he was acquitted of using or causing others to use facilities in interstate commerce to promote, manage, establish or facilitate a prostitution business in the City of Buffalo, and of persuading, inducing, enticing



or causing girls under the age of eighteen to travel in interstate commerce to become engaged in prostitution, defrauding or other practices.

Thus, although an acquittal of the substantive counts occurred, a conviction under the conspiracy count was possible if the Government proved beyond a reasonable doubt that appellant conspired to commit any of the substantive offenses. Of course, mere non-participation in the actual substantive offenses as the jury found here, does not preclude a conspiracy conviction.

However, in order to obtain a conviction under Sec. 371, certain proof is necessary:

"Our decisions establish that in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." United States v. Feola, 420 U.S. 671, 686.

The Supreme Court in Feola explained that "a conspiracy to commit [a substantive offense] is nothing more than an agreement to engage in the prohibited conduct". (687) To the same effect, see Ingram V. United States, 360 U.S. 672, 678; United States v. Vilhotti, 452 F.2d 1186, 1189 (2d Cir. 1971); U.S. v. Tavoularis, 515 F.2d 1070, 1074 (2d Cir. 1975).

The issue here, then, is whether appellant, Salvatore Riniolo, became a member of a conspiracy with the specific intent that the provisions of 18 U.S.C. 2141, 2142, 2143, and/or 1952, be violated. As the trial court properly charged:



"[Appellant] is not being tried for being a pimp, if he is one, or for being a partner in a house of prostitution. The charges here are limited to violation of specific Federal laws, and to conspiracy to violate those laws..." (T.T. 369)

The trial court also properly charged the elements that had to be proved for the conspiracy count:

1. An agreement had been entered into to violate the federal laws; and,

2. "That [appellant] knowingly and willfully associated himself with the conspiracy and did so with the required specific criminal knowledge and intent, that is, that he became a member"; and that,

3. An overt act in furtherance of the objectives of the conspiracy was committed. (T.T. 369)

It could not credibly be maintained that the Government had failed to prove that a conspiracy existed to violate the substantive federal laws at issue (i.e., federal prostitution offenses). The testimony of Betty Grand, the Pittsburgh, Pennsylvania "madam", established that Linda Ferguson, who was the "madam" of the Buffalo, New York house, had called her several times "because she was short of girls and asked me if I knew anybody that would be interested in working for her." (58-59) Phone company records, and tapes of these calls, were introduced into evidence as well. At least one of Betty Grand's girls, "Vickie", went to work for Linda Ferguson. (59-61)

Without more, Betty Grand's testimony establishes a conspiracy to violate the federal substantive prostitution laws and also proves a completed, overt act in furtherance thereof.



That Linda Ferguson and Betty Grand, between themselves or together with others named or unnamed in the indictment, may have conspired to violate the federal substantive prostitution laws does not prove appellant's participation in their conspiracy. His participation must be independently proven, and it is this aspect of the case that appellant contends was not made out by the Government.

This Court recently discussed the quantum and nature of the proof necessary to convict a defendant of a conspiracy charge once the fact of a conspiracy has been established:

"When, as in this case, the existence of a conspiracy has been shown, evidence sufficient to link another defendant with it...may be circumstantial in nature. U.S. v. Manfredi, 488 F.2d 588, 596." U.S. v. Head, 546 F.2d 6, 9-10 (2d Cir. 1977).

If the evidence linking a defendant to the conspiracy is circumstantial, the test for sufficiency, on appeal, is that established in Glasser v. United States, "of whether there was 'substantial evidence taking the view most favorable to the government' to support the jury's verdict. 315 U.S. 60, 80...". United States v. Dearden, 546 F.2d 622, 624 (2d Cir. 1977). The evidence is to be viewed most favorably to the Government, "taking into account the evidence presented by the defendants as well as that presented by the Government..." (U.S. v. Johnson, 513 F.2d 819, 821, 2d Cir. 1975).

Moreover, in this circuit, the circumstantial evidence must establish the specific federal element--in this case, the



interstate aspect. In other words, the defendant must be linked to the conspiracy with proof that he specifically intended to violate the federal laws. U.S. v. Vilhotti, *supra*; U.S. v. Crimmins, 123 F.2d 271. In determining whether the evidence is sufficient, each case depends on its own facts, and prior cases are not deemed controlling. U.S. v. MacDougal-Pena, 545 F.2d 833, 835 (2d Cir. 1976). However, in weighing the circumstantial evidence, "(a)s was held in Tot v. U.S., 319 U.S. 463...there must be a rational connection between the fact proved and the inference to be drawn." U.S. v. Prujansky, 415 F.2d 1045, 1050 (6th Cir. 1969).

In the instant case, the jury could clearly have found that appellant and Linda Ferguson had had a relationship of some years standing. All the direct testimony as to the nature of this relationship was that it began as prostitute-client but later developed into a deeper, emotional attachment and even Government witnesses so testified. Flora Majusick stated that Linda "was madly in love with [appellant]." (T.T. 98).

The jury could also have properly determined that appellant was frequently\* at Linda Ferguson's apartment. This was, however, not inconsistent with an emotional relationship.

It was within the jury's province to find that appellant was aware of Linda Ferguson's prostitution business. Since his initial contact with her was as her customer, he obviously knew

\*It should be noted in passing that the Government witnesses who testified to seeing appellant at Ferguson's apartment had worked for Linda less than eight weeks over the nearly two year period covered by the indictment. This factor goes to the weight of such testimony in appellant's involvement with Ferguson, rather than to whether he was involved at all which has never been denied.



she was a prostitute. If he was often at her apartment when some of her "girls" were there, it is reasonable to infer he knew who they were and what they were there for. Rita Burchill, for example, testified that she saw appellant looking at Linda's records of earnings with her one night (117).

However, being aware of Linda's business still does not lead reasonably or logically to the inference that appellant conspired to transport women in interstate commerce for the purpose of prostitution. Moreover, the other testimony is against such an inference.

1. It is undisputed that all the arrangements of the business, of getting the girls in, of setting up house rules, of splitting the money with the girls, and of running the house were handled by Linda Ferguson. Linda called Betty Grand to obtain girls (56-59); she called Flora Majusick several times to get her to work for her (72-77); she arranged with Raymond Pandelli for Rita Burchill (108, 109), and with Harold Nelson for Darlene Baggetta, to come to Buffalo (145, 146); and she called Ellyn Camiel in Boston to work for her (133-135).

2. Rita Burchill, testifying for the Government, stated that she met Mamie Harris at Linda Ferguson's, and that Mamie "was helping Linda in her business..." (112). Linda Ferguson and Mamie Harris both testified for the defendants that they went into business together for a short period of time after Linda had had a hysterectomy (218). Rita Burchill also testified that Mamie Harris went with her to pick up her ticket back to Ohio when she was finished working for Linda (118-119).



3. The Government sought to make such of the fact that Linda Ferguson had apparently referred to appellant as "my old man". The inference the Government wanted drawn was that appellant was Linda's pimp, and was a partner in her business. The record will not support that inference.

Rita Burchill testified that Linda had told her she was crazy to work for a pimp, "that I would do better by myself" (130). This was consistent with Linda's later testimony that she felt all pimps were leeches (223).

Betty Grand stated that most prostitutes refer to their pimps as "my old man" (70), and Flora Majusick and Ellyn Camiel testified that "my old man" meant "pimp" (79, 139). Betty Grand also stated that she referred to her husband as "my old man", although he had never been her pimp (89-90); and Ellyn Camiel said that "my old man" meant a boyfriend (138) as well as having other legitimate connotations (140). Thus, while Linda admitted referring to appellant as her old man, it is rank speculation to decide she meant "pimp" rather than "boyfriend" or lover.

4. Marian Riniolo, appellant's wife of seventeen years, testified that the family did not own a home but instead had rented a \$185/month apartment, had a used five year old (at the time of trial) car on which there was a car loan, that they had financial hardships (291), and that she had just finished paying off a bill for her furniture. None of this evidence was controverted, nor did the Government offer any affirmative or even inferential evidence to demonstrate that appellant had



received any of whatever profits there may have been from Linda Ferguson's prostitution business. None of the Government witnesses ever saw appellant being given a share of the proceeds that came to Linda.

As against all the foregoing evidence, most of it having come from Government witnesses, only two pieces of testimony which permit even speculation that appellant had a part in Linda Ferguson's business operation:

1. Darlene Baggetta testified that appellant had, on one occasion, picked up one unmarked white envelope, containing her earnings, to be delivered to Linda Ferguson. This was the first time she was working for Linda (152). Not only was there no proof that appellant knew what was in the envelope, there is no necessary inference that, even if he did know, he was acting in any capacity other than as a "messenger boy", doing a favor for someone with whom he was emotionally involved. This hardly indicates that he was a pimp and thus Linda Ferguson's boss.

2. Darlene Baggetta testified that after she was arrested on January 18, 1974, for state prostitution violations, Linda Ferguson bailed her out of jail and then appellant picked them up. Appellant's action in this regard is completely innocuous.

Darlene further said that once back at Linda's apartment, "they said that they were going for a good six years and that they expected a bust...". The Court clarified that "they"



referred to appellant (147-8).

On this latter testimony, the jury could have linked appellant to a part of the operation. Yet, even this testimony came from a young girl who was subject to both state and federal prosecution for prostitution, and who thus had a compelling motive for testifying favorably for the prosecution. The probative force of her testimony must thus outweigh all the other contrary evidence that militates against appellant's having been a "partner" in Linda's business. It is respectfully submitted to this Court that only caprice, not reason, supports such a conclusion.

Nevertheless, even if this Court feels that the jury could properly have found that appellant was involved in the operation of Linda Ferguson's prostitution business, that still does not make him guilty of a conspiracy to violate the federal laws. Crimmins and Vilhotti, supra, mandate that the federal element be established, and this record will not support such a finding. Clearly, the alleged admission does not rise to the level of a confession that he had violated the federal conspiracy statute with respect to prostitution, U.S. v. Crimmins, supra.

The evidence need not be rehearsed again on this aspect of the offense. Quite simply, there is no evidence to show appellant intended the federal substantive laws be violated, and there is nothing that permits a reasonable inference that he so intended. The best that can be said is this: that the jury



decided that appellant was involved in some way with Linda Ferguson's business, and that, therefore, he had to have been guilty of at least conspiracy.

This approach is sheer bootstrapping. All the evidence clearly demonstrates that Linda Ferguson was in charge of the operations of the business. It is pure speculation that appellant knew, if he actually was involved in the business, how she handled the details. There is no evidence that he conspired to violate the federal law. There is not one tangible link that ties appellant to an intent to specifically transport women in interstate commerce, Crimmins, supra.

The problem with the Government's case against appellant was aptly pointed out by the trial court in ruling in a motion to discuss the offense charged: the evidence was "awfully thin" (309). The prosecutor told the jury on summation that the case was made up of "nickels and dimes" (321), but it is hard to see where even those added up to very much at all.

This Court noted, in footnote 10 to its opinion in United States v. Tavoularis, supra, that

"(a)n inference relied on to establish an element of a crime will be rejected as violative of due process 'unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' Leary v. United States, 395 U.S. 6, 36...Whether the inference must also satisfy the 'beyond a reasonable doubt' test of In Re Winship, 397 U.S. 358...is a question yet to be decided." (1075)

In a further footnote, 11, this Court noted that



"(i)t may well be that a factor relevant to the determination of that issue in any particular case would be whether...the inference was the only evidence tending to prove an essential element of the crim..." (1075)

Appellant submits that, under the facts of this case, the stricter standard of the Winship case must apply. However even under the less rigid rule, the burden of proof was not met.

As was reiterated by the Supreme Court in Ingram v. United States:

"Without the knowledge, the intent cannot exist....Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal....This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning...a dragnet to draw in all substantive crimes." supra, at 680, citing Direct Sales Co. v. United States, 319 U.S. 703, 711.

For these reasons, the instant conviction for conspiracy to violate the federal prostitution laws must be reversed.



POINT II

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT  
DID NOT ESTABLISH PROBABLE CAUSE TO BELIEVE  
THAT A FEDERAL CRIME HAD BEEN COMMITTED

Prostitution, by and large, is a state crime which accordingly should be dealt with by state law enforcement officials. It is only when prostitution becomes an interstate enterprise that federal agents can legally be involved in its detection and prevention. United States v. McConney, 329 F.2d 467.

The Trial Judge's instructions to the jury echoed this principle:

"Please notice that mere prostitution or merely having a share in the operation of a house of prostitution or two houses of prostitution, or conspiring to run two houses of prostitution, or being a pimp, these do not violate Federal law. The charge of conspiracy is directed towards an agreement to violate the Federal laws against prostitution, and when I speak of interstate prostitution violations as being the purpose of the alleged conspiracy, I refer to the statute that I just read, and the following three statutes, which I will now read to you." (367)

In United States v. Brouillette, 478 F.2d 1171 (5th Cir. 1973), the Court of Appeals was confronted with an issue identical to the one being raised on this appeal--i.e., whether a federal officer, in seeking a search warrant, must "present evidence ample to establish probable cause that a federal crime has been committed". Brouillette, supra, at 1173. The Fifth Circuit resolved this issue thusly:

"...In granting a search warrant to a federal agent, we feel there must be some



showing that a federal crime has been or is being committed. To establish the probability of a crime under 18 U.S.C. §1952, it seems necessary to present facts concerning both the state law being violated and the manner in which interstate commerce is involved in the violation." Brouillette, supra, at 1176, emphasis supplied.

With respect to the case at bar, the only information submitted to the U.S. Magistrate in support of the Government's application for a warrant authorizing the search of 829 Elmwood Avenue (lower) and 200 Niagara Street, Apartment 401 (both addresses being located in the City of Buffalo), was contained in an affidavit authored by Special Agent Ronald Lee Hawley of the Federal Bureau of Investigation.

Hawley's affidavit was based primarily upon secondhand information allegedly obtained from three sources, two of whom were unidentified. One of the unnamed sources, hereinafter referred to as Source I, was personally known to Agent Hawley. This informant was a private citizen who for the previous two years had patronized the prostitution operation allegedly run by Linda Ferguson from her residence at 829 Elmwood Avenue (lower). Within ten days of the warrant application, Source I made telephone arrangements with Linda Ferguson who directed him to go to Apartment 401 at 200 Niagara Street. There, he had sexual intercourse with a prostitute named "Darlene" who told him that she was from Albany and "had previously worked as a prostitute in Boston".

The only named informant, hereinafter referred to as Source II, was identified in Hawley's affidavit as "Joyce Williams",



the prostitute apparently patronized by Source I within ten days of the warrant application. Hawley was not personally familiar with her, and received all information concerning her from Officer Dayka of the Buffalo Police Department.

As stated in Hawley's affidavit, Source II had been arrested on January 18, 1974, and charged with prostitution in violation of Section 230.00 of the Penal Law of New York. Subsequent to her arrest, Miss Williams allegedly told Dayka that Linda Ferguson contacted her by telephone in Boston, Massachusetts, and told her to take a bus to Buffalo for the purpose of engaging in prostitution. Upon her arrival, arrangements were made for Source II to stay at Apartment 401, 20<sup>th</sup> Niagara Street, where she was to ply her trade as a prostitute.

The third informant, hereinafter referred to as Source III, was unnamed and not personally known to Agent Hawley. Information concerning her was passed on to Hawley by fellow FBI agent Taylor. Source III allegedly "was brought to Buffalo from another state" in late 1972, and worked as a prostitute for Linda Ferguson and Salvatore Riniolo for a one week period.

This, in basic form, was the essence of Agent Hawley's affidavit. It is urged that the information contained therein did not support a finding of probable cause that a federal crime had been committed.

The District Court, in denying appellant's motion to suppress, found that the Brouillette requirement of showing the existence of a federal crime had been fulfilled by Joyce William's



statement that Linda told her to take a bus to Buffalo to engage in prostitution.\* While admittedly this statement--if found to have been actually uttered and if found to be reliable--would have provided the essential interstate element, several factors suggest that the lower court erred in upholding the validity of Magistrate Maxwell's warrant on the basis of this unsatisfactorily corroborated, secondhand information.

Recognizing at the outset that the usual rules regarding a showing of an informant's previous reliability do not apply to a participant in a crime (United States v. Miley, 513 F.2d 1191, 1204 [2d Cir. 1975]), the fact cannot be ignored that Source II's information regarding the phone call to Boston was secondhand. Agent Hawley admitted at the hearing that he never spoke with Joyce Williams nor did he read the statement which she allegedly gave to Detective-Sergeant Dayka (Hearing Transcript, p. 19). What the question boils down to is whether the issuing Magistrate had a "'substantial basis' for crediting the hearsay". United States v. Harris, 403 U.S. 573, 581; United States v. Karathanos, 531 F.2d 26, 31 (2d Cir. 1976).

To answer this question, the following factors become relevant. From Agent Hawley's affidavit, it is clear that Source II had lied about her name on at least one occasion. While she was identified in the agent's affidavit as Joyce Williams, Hawley concluded that she was the same person patronized by

\*Significantly, the District Court did not point to any information allegedly received from Sources I and III as supportive of a finding that a federal element had been established.



Source I who identified herself as "Darlene". This, coupled with Dayka's testimony at the hearing that, based upon his experience, he has found that prostitutes often "do give different names and different addresses" (Hearing, p. 52) dictated against a finding that her information regarding the call to her in Boston was reliable. Thus, this was not a crime where "informants are 'much less likely' to lie...." as was the case in United States v. Sultan, 463 F.2d 1066, 1069 (2d Cir. 1972), which concerned the concealing of assets of a bankrupt. Prostitutes, because of the nature of their business, often times tend to lead a life of deceit. Mindful of this, it was incumbent upon the government to satisfactorily corroborate Joyce Williams' hearsay allegations regarding the interstate nature of the operation before a warrant could be legally issued.

Independent corroboration of an informant's reliability is a common thread which runs throughout a myriad of cases decided since Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). Perhaps what is most significant about the case at bar is what the government neglected to do with respect to corroborating the essential federal element. It would not have been unreasonable to have required the federal agent to check readily available telephone company records which could have verified Linda Ferguson's alleged phone call to Joyce Williams in Boston. Such records are a common, corroborative device. See United States v. Rollins, 522 F.2d 160, 162 (2d Cir. 1975), and Mapp v. Warden, N.Y. State Corr. Inst., Etc., 531 F.2d 1167, 1171



(2d Cir. 1976). The usefulness of telephone records to corroborate the alleged interstate element in the instant case is beyond cavil.

Most significant with respect to the government's failure to meet its corroborative burden is the fact that Joyce Williams' trial testimony was completely counter to the statement attributed to her in Hawley's affidavit. At trial, she testified that the arrangements for her to come to Buffalo to work as a prostitute were made through her pimp in Albany--Harold Nelson (Trial Transcript, p. 145). Furthermore, she stated that she herself was in Albany when she first learned that she was going to work for Linda Ferguson (Trial Transcript, p. 146).

It has been stated by this Court that

"the accuracy of the information provided by the informant is not relevant. Probable cause is established if the facts alleged by the informant, if true, establish illegality and the affiant-agent has reasonable grounds for believing in the truth of the allegations." United States v. Perry, 380 F.2d 356, 358 (2d Cir. 1967, emphasis added)

It is urged that Agent Hawley, by failing to corroborate Joyce Williams' alleged statement about the interstate commerce aspect, did not have "reasonable grounds for believing in the truth of [her] allegations". More importantly, Miss Williams' about-face at trial emphasizes the need for requiring a showing of constitutionally adequate corroboration.

In the final analysis, determinations of probable cause must be evaluated on a case-by-case basis. However, with respect to crimes (such as prostitution) which involve the illegal use of interstate commerce, hearsay information submitted



to a Magistrate must be carefully scrutinized to insure that probable cause, as far as the essential federal element is concerned, does exist. Because of its jurisdictional significance, allegations concerning the interstate involvement must be sufficiently corroborated to warrant belief.

Since this was not achieved in the instant case, the warrant must fail and the fruits of the searches, admitted at appellant's trial, must be suppressed.

### POINT III

#### THE SENTENCE WAS EXCESSIVE

On October 28, 1976, the court below imposed a two and one-half year indeterminate sentence of imprisonment on appellant for the conspiracy conviction which had been returned against him. Appellant contends that under all the factors of this case, that sentence was unduly harsh and excessive, and should be modified by this Court.

The sentencing court itself noted that appellant had no previous criminal conviction. It stated that appellant had "been a good father to your own children and to the daughter of the co-defendant." (23)\* Many people of substance and standing in the community, according to the record, sent letters of recommendation to the court on appellant's behalf.

Two things seemed to weigh heavily on the court's mind when imposing sentence. The first is that appellant had been a welfare recipient for nearly a year. Appellant explained to the court that he had always worked previously, having owned retail stores, but that after these charges were placed against him, he experienced certain difficulties, and was evicted from more than one location. In part, this stemmed from problems with zoning. Even the trial evidence supports appellant's contention that, except for recently, he had always worked to support himself, his wife and his children. Certainly, the fact that circumstances

\*Refers to pages of the Sentencing Transcript, dated 10/28/76.



not of his own making forced him to accept public assistance should not play any part in the court's decision as to what sentence to impose.

The second factor is the court's suspicion that organized crime was involved in this situation:

"And here there is this tremendous income, and where did it go? That suggests an air of mystery and suggests that an organization exists with respect to this business..."  
(26)

If the evidence at trial, as appellant has contended elsewhere in this brief, required the piling of inference upon inference to reach the conclusion that appellant had conspired to violate the federal laws, such greater speculation is required to be indulged in to support the trial court's theory about organized crime.

There was no proof, nor any hint of proof, that organized crime was involved in this operation of Linda Ferguson's. The court's speculation is not well-founded in this regard. The court questioned where the proceeds from the business went, but the court had heard no testimony one way or another on this point. Linda Ferguson never specifically testified about this, although she did state, and was not contradicted, that she was supporting her mother and her little daughter; and, in addition, she was supporting herself and paying rent on two apartments.

The court noted, too, that "nobody, not the landlord, not the neighbors, not the vice squad, bothered this business."

(25) One wonders why a particular sentence should be imposed



upon any given criminal defendant, because, wholly or in part, the community was somehow derelict in failing to take notice of the criminal activity.

Appellant stands before this court as a man without a prior conviction, an admittedly good father and husband (albeit somewhat errant), a man who worked honestly most of his life to support himself and those who depended upon him, and a man whose ties in the community were such that many people wrote the court on his behalf. This is, further, a man who was convicted on the slenderest, most tenuous, of proof. Yet, this man, for reasons that are unclear from the record, the court determined to hold up as an example to the community, solely, as a deterrence.

Deterrence clearly is an aim to be considered in sentencing. So, too, is rehabilitation. Mercy is part of justice, as is even-handedness. Linda Ferguson, who was an admitted prostitute, who ran the business by her own admission for eight or nine years, received a sentence of probation. It was Linda Ferguson who admitted receiving the proceeds of the business, and whom the girls who worked for her testified about having split their earnings with. There was not one iota of testimony to prove that appellant received anything from the business. Not one witness ever saw, or heard of, him receiving any of the proceeds. Suspicion, there may be; proof, there was



none.\*

Given all these considerations, appellant respectfully requests that this court, in the interests of justice, modify his sentence.

\*The presentence report details nearly \$12,000.00 in judgments against appellant. His used car, about which so much was made at trial, had been purchased from his parents. This is not the picture of someone who shares in the proceeds of a lucrative business.



UNITED STATES COURT  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-vs- :

AFFIDAVIT 76-1583

SALVATORE S. RINILOLO, :

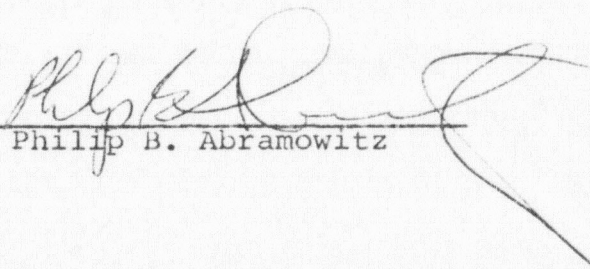
Defendant-Appellant. :

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STATE OF NEW YORK)  
COUNTY OF ERIE ) SS:  
CITY OF BUFFALO )

PHILIP B. ABRAMOWITZ being duly sworn, deposes and says:

That on this date, March 17, 1977, I did deposit in  
the United States mailbox located at the Main Place Tower, Buffalo,  
New York, two copies of the Brief and one copy of the Appendix  
in the above case and addressed the said material to Henry Walker  
Esq., Criminal Appeals Division, United States Department of  
Justice, Washington, D.C.

  
Philip B. Abramowitz

Sworn to before me this  
17th day of March, 1977.

Janet Search

JANET SEARCH  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires March 10, 1978



CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE CONVICTION  
BE REVERSED

Dated: Buffalo, New York  
March 17, 1977

Respectfully submitted,

Philip B. Abramowitz

GROSS, SHUMAN, LAUB & DAVID  
Of counsel